86 - 1488

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

NO. _____

BOBBY ROY DENNIS, SR.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

SHEPPARD AND WHITE, P.A.
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Jacksonville, Florida 32202
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QUESTIONS PRESENTED FOR REVIEW

1. Do black males constitute a cognizable group whose exclusion, as black males, from jury service in a criminal case through the Government's use of peremptory challenges implicate the principles espoused in Batson v. Kentucky, 476 U.S. _____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)?

2. In a criminal case, does the fact that the prosecutor did not exclude all blacks, or as many blacks as possible, from the jury through use of peremptory challenges necessarily preclude an inference of discrimination in the prosecutor's challenges to the blacks who were excluded?

PARTIES TO THE PROCEEDINGS BELOW

In addition to Bobby Roy Dennis and the United States of America, the following people were parties to the proceedings in the Eleventh Circuit Court of Appeals:

Brenda Jewell Hurley
Sharon Denise Cohen
Clarence Bobby Jennings

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The initial decision of the Eleventh Circuit Court of Appeals was rendered April 14, 1986, and is reported at United States v. Dennis, 786 F.2d 1029 (11th Cir. 1986). On November 24, 1986, the panel granted in part and denied in part the petitioner's petition for rehearing. That opinion is reported at United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986).

JURISDICTIONAL STATEMENT

The initial judgment of the Eleventh Circuit Court of Appeals was entered April 14, 1986. On November 24, 1986, the panel, on rehearing, granted in part and denied in part the petition for rehearing. On December 24, 1986, the petition for rehearing en banc was denied.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United ates Constitution provides, in pertinent rt:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

ction One of the Fourteenth Amendment to e United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was charged with, and convicted of: engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848 (1982); conspiring to possess with intent to distribute controlled substance, in violation of 21 U.S.C. § 846 (1982); and using a communication facility to facilitate the § 846 conspiracy, in violation of 21 U.S.C. § 843(b) (1982).

The jurisdiction of the district court derived from 18 U.S.C. § 3231.

The petitioner, Bobby Roy Dennis, Sr., and nine co-defendants were indicted September 13, 1984, in a twenty-two count indictment [R. 1, 23].

Count one charged the petitioner with conspiracy to distribute and to possess with intent to distribute controlled substances, including heroin, cocaine,

marijuana, and talwin. Counts two, three, eight, nine, eleven, twelve, fifteen, sixteen and seventeen charged possession with intent to distribute and to cause to be possessed with intent to distribute heroin and cocaine. Counts ten and fourteen charged possession with intent to distribute and to cause to be possessed with intent to distribute heroin, cocaine and marijuana. Count five charged the petitioner with the use of a telephone facility to commit a felony. In count seven, the petitioner was charged with engaging in a continuing criminal enterprise (CCE) and that count also sought the forfeiture of his home located at 2504 Spring Park Road, Jacksonville, Florida. Count seven (CCE) identified counts one through nineteen as predicate offenses of that count. Counts thirteen, eighteen and nineteen charged possession with intent to distribute cocaine.

The case proceeded to trial, minus three co-defendants who pled guilty prior to trial and testified for the prosecution. A fourth co-defendant, Anthony Jerome Stinson, was a fugitive during trial.

Jury selection began on December 3, 1984, with the district court conducting voir dire of the jurors.

During jury selection, the prosecution used peremptory challenges to strike three black males: Patten [Tr. 22, 26] and Thompson [Tr. 22, 27] from the regular jury, and Williams [Tr. 22, 30] as an alternate. No black male served on the jury. The petitioner, the target defendant at trial, is a black male.

After each black male was challenged by the Government, counsel for the petitioner objected and requested the trial court to inquire as to the Government's reasons for striking these apparently-qualified blacks from the jury. These requests were denied.

On appeal to the Eleventh Circuit Court of Appeals, the petitioner raised the discriminatory challenge issue in a supplemental brief based on the then-recent opinion of the Second Circuit Court of Appeals in McCray v. Adams , 750 F.2d 1113 (2nd Cir. 1984). The Eleventh Circuit, relying on Swain v. Alabama , 380 U.S. 202 (1965), rejected the reasoning of the McCray court. United States v. Dennis , 786 F.2d 1029, 1048-49 (11th Cir. 1986). The petitioner requested rehearing and rehearing en banc, relying on the intervening decision of this Court in Batson v. Kentucky , 476 U.S. _____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The panel below held that Batson did not apply to the facts of the instant case. United States v. Dennis , 804 F.2d 1208 (11th Cir. 1986), and denied rehearing and rehearing en banc. This petition followed.

ARGUMENT

During jury selection, the prosecution used peremptory challenges to strike three black males: Patten [Tr. 22, 26] and Thompson [Tr. 22, 27] from the regular jury, and Williams [Tr. 22, 30] as an alternate. No black male served on the jury. The petitioner, the target defendant at trial, is a black male.

After each black male was challenged by the Government, counsel for the petitioner objected and requested the trial court to inquire as to the Government's reasons for striking these apparently-qualified blacks from the jury. These requests were denied.

An examination of the record of the voir dire reveals no racially-neutral justification for striking these veniremen. In fact, Williams stated he had been called by the Government as a witness in criminal prosecutions [Tr. 21, 74]. This background would likely make Williams more sympathetic

to the prosecution. Williams has also been the victim of a burglary, an experience unlikely to endear the criminally-accused to him [Tr. 21, 153-154]. Similarly, Patten's mother was the victim of a burglar [Tr. 21, 130]. Three of the four strikes exercised by the Government were used against blacks.

Nothing whatever in the record provides any explanation for the Government's refusal to allow any of these men to serve as jurors in this cause, other than the fact that they are black males, and the appellant is a black male.

On direct appeal, the petitioner was allowed to file a supplemental brief on the peremptory challenge issue, based on the decision by the Second Circuit Court of Appeals in McCray v. Adams, 750 F.2d 1113 (2nd Cir. 1984), an opinion rendered after the initial brief was filed. The McCray Court, relying on the Sixth Amendment guarantee of a fair cross-section in the

petit jury, held that the prosecution may not use peremptory challenges to exclude a cognizable group in the community from the jury. Under McCray, to make out a prima facie case of discriminatory jury challenges, the defendant must show, first, that "the group alleged to be excluded is a cognizable group in the community", and second, that "there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venirepersons' group affiliations" rather than because of the ability to hear and decide the case based on the evidence presented. 750 F.2d at 1131.

In its initial opinion, the Eleventh Circuit panel rejected the McCray analysis and relied instead on the then-viable rule of Swain v. Alabama, 380 U.S. 202 (1965) [1/]. Swain, an equal protection case,

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[1/] The panel noted that five members of

required a showing that blacks have been completely excluded in "case after case" before a prima facie case of discrimination in the use of a prosecutor's peremptory challenges could be found. 380 U.S. at 223-24. The Eleventh Circuit held that the petitioner's argument failed the difficult test established in Swain. United States v. Dennis, 786 F.2d 1029, 1048-49 (11th Cir. 1986). The petitioner filed a motion for rehearing and rehearing en banc, urging that the intervening decision by this Court in Batson v. Kentucky, 476 U.S. _____, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) required a different resolution of the jury challenge issue. In Batson, this Court

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1/ (cont.) this Court had expressed doubt about the continuing vitality of Swain, citing McCray v. New York, 461 U.S. 961 (1983). The panel also observed that certiorari had been granted in Batson v. Kentucky, 471 U.S. _____, 105 S.Ct. 2111 (1985). Nevertheless, the panel decided the jury challenge issue on the rule of Swain, without awaiting further guidance from this Court.

overruled the relevant portion of Swain v. Alabama.

This Court, in Batson, declined the opportunity to avoid the precedent set in Swain by deciding the case on Sixth Amendment grounds as had the McCray court. Instead, this Court's opinion was grounded squarely on the equal protection clause, and thus confronted the Swain rule directly. The Court observed that the decision in Strauder v. West Virginia, 100 U.S. 303 (1880) made clear long ago that placing a black defendant on trial before a jury from which members of his race had been purposefully excluded denied the defendant equal protection of the laws. 90 L.Ed.2d at 79-80. A defendant has a right to trial by a jury selected pursuant to nondiscriminatory criteria. Id., citing, Martin v. Texas, 200 U.S. 316, 321 (1906); Ex parte Virginia, 100 U.S. 339, 345 (1880). This Court reiterated that the equal protection clause forbids the state

(or government) to exclude members of the defendant's race from the venire on account of race, or "on the false assumption that members of his race are not qualified to serve as jurors." Id. Race, the Batson Court stated, is simply "unrelated to his fitness as a juror." Id., quoting, Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946).

The Court ruled that because "Swain has placed on defendants a crippling burden of proof," the Swain standard must be rejected "as inconsistent with standards that have been developed since Swain for assessing a prima facie case under the Equal Protection Clause." Id. at 85.

The quorum of the Eleventh Circuit panel [2/], on rehearing, struck the portion of its previous opinion which related to

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[2/] One of the members of the panel which heard oral argument, Judge Tuttle, was prevented by illness from participating in the decision.

the Government's use of peremptory challenges during jury selection. United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986). The quorum, in its substituted opinion, held that the recent decision by this Court in Batson did not alter the result. The quorum made two specific, though related, findings in support of its ultimate holding. First, the court held, black males do not constitute a cognizable group whose purposeful exclusion would implicate the Fourteenth Amendment. Second, the quorum found that since the Government left two black females on the jury while using only three of the six peremptory challenges it was allowed, it was "thus obvious that the Government did not attempt to exclude all blacks, or as many blacks as it could, from the jury." 804 F.2d at 1211. Each of these rulings is at war with the principles espoused in Batson, and conflicts with this Court's subsequent ruling in Griffith v. Kentucky,

_____ U.S. _____, 55 L.W. 4089 (1987), as well as with another decision of the Eleventh Circuit in United States v. David, 803 F.2d 1567 (11th Cir. 1986).

Black Males as a Cognizable Class

The quorum below ruled that black males do not "constitute a distinct, recognizable subclass of individuals who have been singled out for different treatment under the laws." 804 F.2d at 1210. Thus, the prosecutor's use of peremptory strikes to exclude all black males from the jury did not contravene the equal protection clause or the defendant's right to a fair cross-section of the community on the jury.

The fault in the court's reasoning is its unduly narrow interpretation of the concept of a cognizable group. The court apparently believed that the question was whether the appellant was a member of "a cognizable racial group," as defined in Castaneda v. Partida, 430 U.S. 482 (1977).

Ibid. (emphasis supplied). The applicable concept is broader than that.

A "cognizable" group, for Batson purposes, is not limited to race. Sex is included. In Taylor v. Louisiana, 419 U.S. 522 (1975), the defendant, a male, challenged the petit jury venire from which his jury was to be selected. It was stipulated that while 53% of the relevant population eligible for jury service were female, only 10% of the people on the jury wheel in the parish were female. It was further stipulated that the discrepancy between the number of females eligible for jury service and those actually included in the venire was the result of a Louisiana statute which provided that a woman should not be selected for a venire unless she had filed a written declaration of her desire to serve as a juror. 419 U.S. at 523-24. Underlying this Court's holding that the statute operated to violate the defendant's constitutional rights was "the judgment

that women are sufficiently numerous and distinct from men and that if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied." Id. at 531. This Court re-affirmed Taylor in Duren v. Missouri, 439 U.S. 357 (1979). In Duren, this Court invalidated a state statute which automatically exempted women from jury service upon request.

Since it is indisputable that both males and blacks are "cognizable" groups, it follows that the coincidence of racial and sexual identity in the group of black males renders that group "cognizable" within the comprehension of the Sixth and Fourteenth Amendments. Taking as a given that blacks are a group separate and distinct from whites, Taylor and Duren make clear that black males, as males, are sufficiently separate and distinct from black females, as females, to preclude the

exclusion of black males from a jury for reasons based on race and sex.

The only case on point of which the petitioner is aware is People v. Motton, 704 P.2d 176 (Cal. 1985), in which the California supreme court held that black females are a cognizable group for purposes of the Sixth and Fourteenth Amendments. The quorum below erred in limiting Batson to racial groups.

The Need for Total Exclusion of a "Cognizable" Group

Assuming arguendo that black males do not constitute a "cognizable" group, the quorum's ruling conflicts with Batson and Griffith by holding that since the prosecutor did not attempt to exclude all blacks from the jury, there could be no Batson violation. The quorum stated:

> The government utilized only three of the six peremptory challenges it was allowed during the selection of the twelve jurors who decided the

> case, and one of the two challenges to alternates that it was allowed. The government exercised two of the three challenges it exercised when selecting regular members to strike potential jurors who were black, and used the one challenge it chose to exercise when selecting alternate jurors to strike an alternate who was black, but eventually accepted a jury that included among its regular members two blacks. It is thus obvious that the government did not attempt to exclude all blacks, or as many blacks as it could, from the jury. Moreover, the unchallenged presence of two blacks on the jury undercuts any inference of impermissible discrimination that might be argued to arise from the fact that the prosecutor used three of the four peremptory challenges he exercised to strike blacks from the panel of potential jurors and alternates.

804 F.2d at 1210-1211 (emphasis supplied).

The Eleventh Circuit's interpretation of

Batson places its decision in conflict with Griffith.

Although the primary question presented in Griffith was whether the Batson rule should be applied retroactively, the decision, by necessary implication, controls the instant case.

In Griffith, during voir dire, the prosecutor used four of its five available challenges to strike only four of the five prospective jurors who were black. Defense counsel moved to have the panel discharged, "alleging that the prosecutor's use of peremptory challenges to remove all but one of the prospective black jurors constituted a violation of Griffith's Sixth and Fourteenth Amendment rights." 55 L.W. at 4089 (emphasis added). Holding that Batson was retroactive, this Court reversed the affirmance of the defendant's conviction by the Kentucky Supreme Court. Id. at 4092. Clearly, unless a prima facie Batson violation had been made out by the above-

recited facts, it would have been unnecessary for this Court to consider whether Batson applied. Thus, the sure implication of Griffith is, contrary to the holding of the panel below, that to raise the inference of a prosecutor's discriminatory use of peremptory challenges, it is not necessary that the prosecutor exclude as many members of the protected group as it can. The decision in Batson itself restates the principle that a " 'single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions'." 106 S.Ct. at 1722, quoting, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 n. 14 (1977). As the Eleventh Circuit has observed under comparable facts:

> Batson rejects the view in Swain that the Equal Protection Clause only requires that black citizens not be deprived of jury service by being

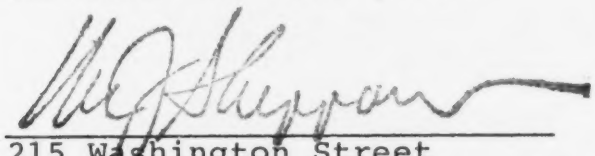
> systematically excluded from petit juries; Batson rests on a rationale that blacks are entitled not to be struck for racial reasons, and black defendants are entitled to be tried in a system free of racially exclusionary practices. This represents more than a group entitlement not to be entirely excluded from participation. Rather, under Batson, the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown.

United States v. David, 803 F.2d 1567, 1571 (11th Cir. 1986). Accord, Fleming v. Kemp, 792 F.2d 1478 (11th Cir. 1986). The Court in Batson rejected the Swain rule that a defendant's rights must be violated consistently and repeatedly before the Constitution provides a remedy. The Batson decision stands for the proposition that invidious discrimination may play no part

at all in the jury selection process. The quorum's narrow application of Batson undercuts the salutary purpose of the decision. Under the reasoning of the quorum below, a prosecutor may strike every black venireman, save one, for no other reason than that they are black, and yet avoid constitutional prohibitions. This Court should grant the petition for writ of certiorari on this issue to prevent this serious erosion of the principles espoused in Batson.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Solictor General, Department of Justice, Tenth and Constitution, N.W., Room 5143, Washington, D.C. 20530; M. Alan Ceballas, Esquire, Assistant United States Attorney, P. O. Box 600, Jacksonville, Florida 32201; Howard W. Skinner, Esquire, Thomas and Skinner, P.A., 221 East Church Street, Jacksonville, Florida 32202; Brent D. Shore, Esquire, 4151 Woodcock Drive, Suite 101, Jacksonville, Florida 32207; and Eugene Murphy, Esquire, 1835 North Third Street, Jacksonville Beach, Florida 32250; by mail, this 20th day of February, 1987.

ATTORNEY